

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE, CIVIL JURISDICTION
SECOND APPEAL NO.280 OF 1997**

Mr. Janardhan Narayan Sarpatil
(Since deceased L. heirs)

age about 58 years, Occ. : Agriculture,
R/o. Kondhave Dhavade,
Tahsil Haveli, Dist. Pune.(Orig. Deft. No.2)

1A. Shantabai Janardan Sarpatil

Aged about 68 years, Occ. Household

1B. Sou. Anjana Kisan Konde,

Age 47 years, Occ. Household,
Residing at Pimplegurav,
Adarsh Nagar, Post Aund Camp,
Tal. Haveli, Dist. Pune.

1C. Rajendra Janardan Sarpatil

Age about 42 years, Occ. Service

1D. Sanjay Janardan Sarpatil

Age 40 years, Occ. Labourer

1E. Shankar Janardan Sarpatil

Age about 37 years, Occ. Service,
Applicant Nos.1A,1C,1D & 1E,
are residing at Kondwe-Ghawade
Post Uttamnagar, Tal. Haveli,
Dist. Pune.

(amendment carried as per Court's
order in C.A. No.200/2007)Dt. 15/02/07..**Appellants**

Versus

1. Mr. Balu Hari Sarpatil

2. Smt. Indubai Bapu Patil

3. Mr. Laxman Bapu Sarpatil

4. Mr. Vitthal Bapu Sarpatil,

5. Mr. Rambhau Hari Sarpatil,

6. Mr. Sudam Hari Patil

7. Mr. Uttam Hari Sarpatil

8. Mr. Sambhaji Hari Sarpatil

9. Smt. Shalan Balasaheb Yadav
All residing at Kondhave Dhavade
Tahsil Haveli,
Dist : Pune.

.. Respondents
(No.1- Org. Plaintiff
Nos.2 to 9- Org.Defts.)

Mr. V.M. Parsharami Advocate for Appellant

Mr. R.G. Ketkar Advocate for Respondents

CORAM : S.R. SATHE, J.

DATED : 21/02/2007

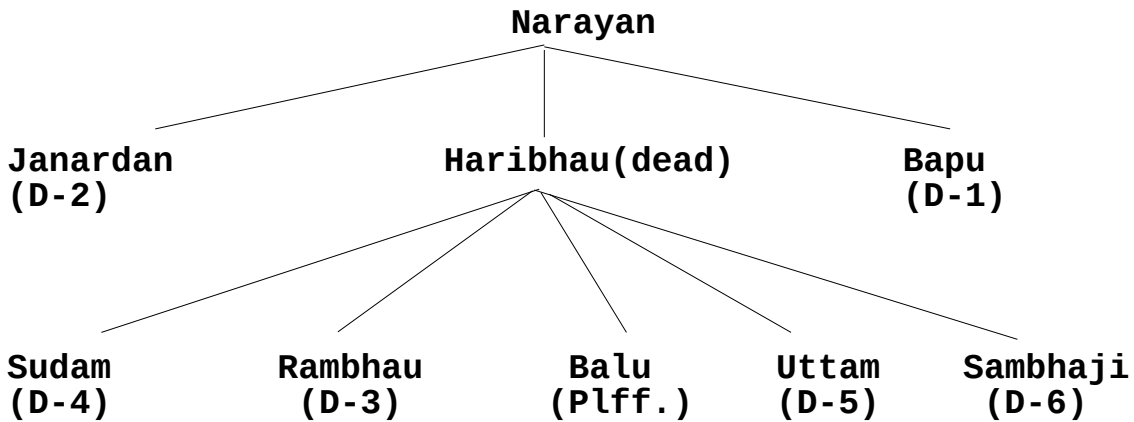
JUDGEMENT :-

1. Appellant the original defendant No.2 in Regular Civil Suit No. 1596 of 1986 has preferred this appeal against the judgement and order passed by the Court of District Judge, Pune whereby order passed by the IVth Jt.C.J.J.D.Pune, decreeing Plaintiff's suit for partition and separate possession was confirmed and appeal was dismissed.

2. For the sake of convenience hereafter the parties shall be referred to as '*Plaintiff*' and '*Defendants*'.

3. In order to appreciate the facts of the case, it would be worthwhile to set out genealogy that can be

spell out from the averments in the plaint.



4. The suit land bearing Survey No.421/1 situated at Kondhave Dhavade, Tal : Haveli described in detail in paragraph-1 of the plaint was initially owned by Narayan. The said land was admeasuring 3 acres 15 gunthas. However, 90 gunthas out of the same was fallow. It was therefore kept common and parties to the suit were concerned with the same. According to Plaintiff, on 17/07/1981 Janardan, the original defendant No.2 and the Plaintiff and other defendants entered into an agreement. As a result of the said agreement, 5 gunthas land out of the suit land was to be given to Bapu for constructing his house. Another 5 gunthas out of the suit land was to be given to Plaintiff and defendant Nos. 3 to 6 and another 5 gunthas were to be given to defendant No.2. Remaining land was agreed to be sold and sale proceeds were to be

divided equally amongst Plaintiff and defendant Nos. 3 to 6 in one part, defendant No.2 in one part and defendant No.1 in one part. After the death of Narayan, Hari Narayan Sarpatil and his brothers obtained loan by mortgaging the said land to Gopal R. Pendharkar and his name was entered in the record of rights for the said land. Even then the land remained in possession of Hari as tenant. After the death of Hari name of Janardan being 'Karta' was entered as tenant. Subsequently, the name of Gopal R. Pendharkar was deleted and name of Janardan was entered in the column of Kabjedar.

5. In the year 1986 or thereabout, Plaintiff found that Janardan, original defendant No.2 was not ready to act, as agreed in the agreement dated 17/07/1981. He started laying a claim for the entire portion of 90 gunthas and started taking steps to dispose of the same without the consent of the other sharers. The other co-sharers therefore issued a notice dated 21/04/1986 to Janardan and informed him not to behave in such fashion and dispose of the land. In spite of the receipt of the notice, Janardan did not give any reply. Hence, Plaintiff filed the present suit for partition of the said 90 gunthas land and also prayed for the permanent injunction that he should not dispose of the land till

decision of the suit.

6. During the pendency of the suit, Plaintiff came to know that Janardan, the original defendant No.2 has sold the land admeasuring 4 gunthas out of the suit land to defendant No.7. Hence, defendant No.7 was impleaded and Plaintiff prayed that land which has been sold to defendant No.7 be allotted to the share of Janardan in partition.

7. The defendant Nos.1 and 3 to 6 filed pursis Exh-18(b) and supported the Plaintiff's case. During the pendency of the suit, the defendant No.1 died and his heirs also supported the Plaintiff vide pursis Exh-21.

8. The defendant No.2 filed his Written Statement Exh-13 and contended that though the Plaintiff has filed suit for partition, he has not included all the joint family properties and as such the suit is bad. He also contended that Plaintiff and defendant Nos. 3 to 6 had no right, title and interest in the suit land and as such they are not entitled to have any share in it. He also denied to have executed any agreement dated 17/07/1981.

9. The defendant No.2 on the contrary contended that Hari Narayan Sarpatil had actually mortgaged the suit land to Gopal R. Pendharkar for Rs. 750/- on 18/04/1944 for a period of 5 years. At that time, there was no legal necessity for mortgaging the said land. Hari Narayan Sarpatil did not redeem the said mortgage during his life time nor the Plaintiff and defendant Nos. 3 to 6 redeem the same. On the contrary, the defendant No.2 paid Rs. 2000/- to Gopal Pendharkar some time in the year 1954-55 and got the said mortgage redeemed. Not only that but the name of defendant No.2 was also accordingly entered in the record of rights. The defendant No.2 also contended that all along the suit land is in his possession and Plaintiff is not entitled to get any share in the same. He also denied to have received any notice dated 21/04/1986. Lastly the defendant No.2 contended that as now there is increase in the prices of the land, the Plaintiff and defendant Nos. 3 to 6 have filed false suit against him. He, therefore, prayed for dismissal of the suit.

10. The defendant No.7 filed her Written Statement at Exh-33 and contended that he is a bonafide purchaser for value without notice. The sale deed is executed on

02/01/1985. According to her, the defendant No.2 was the absolute owner of the land purchased by her and as such no order can be passed in respect of the land purchased by her.

11. On these pleadings the learned trial Judge framed issues Exh-32.

12. In order to prove the suit claim, Plaintiff examined himself at Exh-53. As against this, the defendant No.2 examined himself at Exh-66. Both the parties produced certain 7 x 12 extracts. The Plaintiff also produced the agreement dated 17/07/1981 at Exh-54.

13. After considering the evidence adduced by both the parties, learned Trial Judge came to the conclusion that defendant No.2 has failed to prove that there was any other joint family property and it was necessary to be included in the present suit. The trial Judge also held that the suit land is an ancestral property and Plaintiff and defendant Nos. 1 to 6 are having share in the same and Plaintiff is entitled for partition and separate possession as prayed for. He, therefore, decreed the suit in Plaintiff's favour.

14. Being aggrieved by the said judgement and order the original defendant No.2 Janardan filed Civil Appeal No.163 of 1991. After hearing both the learned Advocates, the learned District Judge dismissed the appeal, with slight modifications in the decree.

15. Being dissatisfied with the order passed by the learned District Judge, the defendant No.2 has filed the present Second Appeal. From the perusal of the record it appears that while admitting the appeal, this Court (*CORAM : A.Y. SAKHARE, J.*) has passed the following order :-

"Admit.

Ground Nos. C and D involved substantial questions of law"

The said grounds are as under :-

(c) Whether the Trial Court was justified in law in holding that the unilateral Agreement dated 17/07/1981 was duly proved in law ?

(d) Whether the alleged unilateral Agreement dated 17/07/1981 is hit by the provisions of the Indian Registration Act?

16. In this appeal before me, Shri V.M. Parsharami,

learned advocate for Appellant-original defendant has urged only two points. *Firstly*, he submitted that the agreement dated 17/07/1981 is neither signed by the Plaintiff nor by the defendant and the same is not duly proved. Even according to Plaintiff, the agreement is signed by defendant No.2 only. So, such unilateral agreement can not be relied upon. *Secondly*, he canvassed before me that the above mentioned agreement is hit by the provisions of Section-49 r/w. Section 17 of the Registration Act, 1908 and as such no relief can be granted to Plaintiff on the basis of the said agreement. As against this, Shri R.G. Ketkar learned advocate for Plaintiff and defendant Nos. 3 to 6 submitted that agreement dated 17/07/1981 Exh-54 is duly proved and both the Courts below have rightly relied on the said document and held that the said property is the joint family property and as such is liable for partition.

17. The relationship between the parties is not in dispute. It is also not disputed that Hari Narayan Sarpatil had mortgaged the land in question to Gopal R. Pendharkar in the year 1944. It is true that there is no document to show that either Plaintiff or defendant No.1 and 3 to 6 paid the amount of mortgage money to

Pendharkar and redeem to mortgage. However, at the same time, it is very clear that even the defendant No.2 has not adduced any cogent and convincing evidence to show that the mortgage was redeemed by him. It must be noted that he is not even aware as to what was the exact mortgage money. In his Written Statement, he has contended that he has paid Rs. 2,000/- to Mr. Pendharkar while it has come in his examination-in-chief that he has paid Rs.3,000/-. He has also admitted that Mr. Pendharkar has not executed a deed redeeming the mortgage. Merely because subsequently name of Hari was entered in the record of rights, we can not jump to the conclusion that he alone redeemed the mortgage as contended by him. Be that as it may, question arises whether after the time when mortgage was redeemed as contended by defendant No.2, whether there is anything to indicate that the said land was treated as a joint family property. If it is so, then certainly the other co-sharers are entitled for partition.

18. In order to show that the said land is a joint family property, the Plaintiff has placed reliance on the agreement dated 17/07/1981 Exh-54. If we peruse the said agreement which is on the stamp paper it is clear that the said stamp has been purchased by the defendant

No.2 Not only that but for having purchased the said stamp, he has also put his signature on the front portion of the said stamp. Besides this, the said agreement is also signed by defendant No.2. Plaintiff has categorically stated that it bears signature of defendant No.2. Though the defendant No.2 has denied to have signed this document, he has not given any explanation as to why the stamp is purchased in his name. He has not given any detail evidence in that behalf. The learned Trial Judge compared the admitted signature of defendant No.2 with the signature appearing on the said stamp and noticed that the admitted signatures and signatures appearing on the stamp are of one and the same person namely defendant No.2. So, both the Courts below have held that the document in question Exh-54 is executed by defendant No.2. There is no reason to set aside the above mentioned concurrent finding of fact.

19. Merely because above agreement is not signed by the Plaintiff or defendant Nos. 2 to 6, it can not be said that the agreement in question (Exh-54) is unilateral agreement. If we see the format in which the above agreement is written we find that the names of Plaintiff and defendant No.1 and 3 to 6 are shown as

persons who are getting the document executed. They are shown as "लिहून घेणार". As against this, the name of defendant No.2 Janardan is shown as a person who is executing the agreement. His name is shown as "लिहून देणार". When such is the position, it can not be said that the agreement is unilateral agreement. The persons in whose favour the document has been executed are not denying the said document or agreement. So, there is no substance in the argument advanced by the learned advocate for the defendant No.2 that the agreement in question is a unilateral agreement.

20. The only point which now falls for consideration is whether the agreement in question is hit by provisions of section 17 and 49 of the Registration Act, 1908. For that purpose, it is worthwhile to see what are the said provisions :-

Section 17 : Documents of which registration is compulsory - (1) *The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of*

1864, or the Indian Registration Act, 1866 (20 of 1866), or the Indian Registration Act, 1871 (8 of 1871), or the Indian Registration Act, 1877 (3 of 1877), or this Act came or comes into force, namely -

(a) instructions of gift of immovable property;

(b) Other non-testamentary instruments which purport or operate to or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property ;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent ;

{(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such

decree or order or award purports or operates to create, declare, assign, limit or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property}

Provided that the State Government may, by order published in the Official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees

(2) Nothing in clauses (b) and (c) of the sub-section (1) applies to --

(i) any composition-deed ; or

(ii) any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the

holder to the security afforded by a registered instruments whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon transfer of any debenture issued by any such company; or

(v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court (Except a decree of order expressed to be made on a compromise and comprising immovable property other than that which is the subject matter of the suit or proceedings); or

(vii) any grant of immovable property by the Government ; or

(viii) any instrument of partition made by a Revenue Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871 (26 of 1871), or the Land Improvement Loans Act, 1883 (19 of 1883); or

(x) any order granting a loan under the Agriculturists Loans Act, 1884 (12 of 1884), or instrument for securing the repayment of a loan made under that Act ; or

(x-a) any order made under the Charitable Endowments Act, 1890 (6 of 1890), vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property ; or)

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer.

(Explanation : A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.)

(3) Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered.

SECTION 49 : Effect of non-registration of documents required to be registered - No document required by Section 17 (or by any provision of the Transfer of Property Act, 1882 (4 of 1882),} to be registered shall --

- (a) affect any immovable property comprised therein, or*
- (b) confer any power to adopt, or*
- (c) be received as evidence of any transaction affecting such property or conferring such power,*

unless it has been registered :

{Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877(1 of 1877), or as evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882 (4 of 1882), or as evidence of any collateral transaction not required to be effected by registered instrument.}

21. In order to find out whether the above mentioned provisions are applicable to the agreement in question we have to determine the nature of the document Exh-54. Whether the document or agreement in question is really creating, declaring, assigning, limiting or, extinguishing any right, title or interest, whether vested or contingent in any of the parties. If we carefully read the agreement Exh-54, it is crystal clear that the said document is not at all for the first time creating, declaring, assigning or even limiting and extinguishing any right, title and

interest of the parties. It only appears that as the land in question was joint family property, the parties or persons having interest in the said properties decided to have some arrangement about the enjoyment of the said properties and for that purpose agreement Exh-54 was executed. Merely because it has been said in the said agreement that 5 gunthas land would be given to each of the branch, we can not jump to the conclusion that by this document partition has been effecting between them. If really it was the intention of the parties to actually partition the property, certainly they would have even specifically mentioned as to which particular portion of 5 gunthas was given to each of the sharers, but that has not happened. So, I have no hesitation to hold that the agreement Exh-54 can not be regarded as document of partition. The registration of a document is unnecessary where the arrangement was purely mutual and one for the enjoyment of the property and there was no limiting or extinguishing of anybody's right. It has been so held long back in a case ANJIRABAI V/S. ANNAPURNABAI AIR 1928 NAGPUR 254. A feeble attempt has been made to show that the Plaintiff has in fact filed the suit on the basis of the said agreement and he has not come out with a case that other joint family property has been partitioned but

only suit land has remained to be partitioned. However, if we carefully peruse the plaint and in particular last portion of paragraph-3 then it is quite evident that the Plaintiff has alleged that partition took place between the heirs of Narayan in respect of other property but the suit property was kept joint. As result of the same ultimately it became necessary to partition the property as the defendant No.2 tried to breach the arrangement which was agreed between the parties vide Exh-54.

22. Thus, from the pleadings of the parties and the evidence on record, I have no hesitation to hold that Plaintiff has proved the suit claim. Both the Court below have rightly appreciated the evidence on record and have correctly held that the suit land is liable for partition between Plaintiff and Defendant Nos. 1 to 6 and while doing such partition the land which is sold to defendant No.7 by defendant No.2 can be allotted to the share of defendant No.2.

23. In this view of the matter, there is no substance in this appeal.

The appeal is dismissed.

Under the circumstances of the case, parties to bear their own costs of this appeal.

(S.R. SATHE, J.)

At this stage, Mr. V.M. Parsharami Advocate for Appellant submitted that the operation of this order be stayed in view of the fact that during the pendency of this Second Appeal, there was stay. Mr. R.G. Ketkar Advocate for Respondents submitted that during all these years, Respondents are deprived from the enjoyment of the suit property and as such the stay should not be granted.

Having regard to all the facts and circumstances, operation of the above mentioned order is stayed for two weeks only.

(S.R. SATHE, J.)